Supreme Court, U.S.
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No. 98-637

In The

Supreme Court of the United States

October Term 1998

LARRY W. SHIVES,

Petitioner,

v.

CSX TRANSPORTATION, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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39 pp

QUESTION PRESENTED

1. Whether an employee of a railroad who was injured while working on a non-maritime related job assignment is precluded from filing a claim under the Federal Employers' Liability Act (FELA)?

PARTIES TO THE PROCEEDINGS

Petitioner, Larry W. Shives is a resident of Maryland. He was the Plaintiff in the lower court proceedings of this case and was the Appellee before the United States Court of Appeals for the Fourth Circuit.

Respondent, CSX Transportation, Incorporated is a corporation organized and existing under laws of Virginia. Respondent was a Defendant to the action in the lower court proceedings and was also the Appellant before the United States Court of Appeals for the Fourth Circuit.

There are no other parties to this action.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 5

1. The Fourth Circuit Opinion regarding application of Longshore Harborworkers Compensation Act (LHWCA) to a railroad employee performing non-maritime activities at the time of his injury is in conflict with decisions of the United States Supreme Court and other courts of appeals 5

CONCLUSION 14

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Cases **Page**

Browning v. B.F. Diamond Const. Co.,
676 F.2d 547 (11th Cir. 1982), cert den.
459 U.S. 1170, 103 S.Ct. 814 10

Chesapeake & Ohio Ry. v. Schwalb,
493 U.S. 40, 110 S.Ct. 381,
107 L.Ed.2d 278 (1989) 10

Hayes v. CSX Transportation, Inc.,
985 F.2d 137 (4th Cir. 1993) 11,12

Hullinghorst Industries, Inc. v. Carroll,
650 F.2d 750 (5th Cir. 1981) 10

In Re: CSX Transportation, Incorporated,
151 F.3d 164 (4th Cir. 1998) 1,5,10

Nacirema Operating Company v. Johnson,
396 U.S. 212 , 90 S.Ct. 347 (1969),
reh den. 397 U.S. 929 5

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249, 97 S.Ct 2348 (1977) 5,7,8,12,13

P.C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 67, 100 S.Ct. 328 (1979) 5,9,10,11

Wilkerson v. McCarthy,
366 U.S. 53 (1949) 13

Statutes and Rules

28 U.S.C. § 1254 (1)..... 1

33 U.S.C. § 902 et. seq. 2,6,7

33 U.S.C. § 903 et. seq. 2,6,7

45 U.S.C. § 51 et. seq. 1,4

PETITION FOR WRIT OF CERTIORARI

Larry W. Shives, respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this action is published at *In Re: CSX Transportation, Incorporated* 151 F.3d 164 (4th Cir. 1998), and is reprinted in the Appendix ("App.") A-1 through A-15. The opinion of the United States District Court for the District of Maryland is unpublished and is reprinted at App. A-16 through A-17.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 16, 1998. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED IN THE CASE

45 U.S.C. § 51 et seq.

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of

the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment...

33 U.S.C. § 902 et seq.

Definitions

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker...

33 U.S.C. § 903, et seq.

Disability or death; injuries occurring upon navigable waters of the United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the

navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On August 28, 1996, Larry W. Shives ("Shives"), an employee of CSX Transportation, Incorporated ("CSXT"), was injured while working as a carman at the Seagirt Marine Terminal in Baltimore, Maryland. Seagirt Marine Terminal is an intermodal facility in Baltimore, Maryland in which freight arrives at and is taken from the terminal by ship, truck and train. As a carman, Shives assisted in loading and unloading of trailers and containers from flatbed railcars. The trailers and containers are removed from or placed onto railcars by crane. The cranes are operated by employees of the Ceres Corporation whose employees are longshoremen and members of the International Longshoremen Association.

According to Shives, he was injured when he slipped on oil and grease surrounding a hitch on one of the railcars. None of the containers carried by the incoming train on which Shives was working at the time of the accident, nor the trailer Shives unhitched immediately before his accident were destined for transport via any maritime vessel. In fact for the entire six years Shives has worked at the Seagirt Marine Terminal, only 15% of the containers carried daily into or out of the entire marine terminal by trains were unloaded from or onto ships.

II. PROCEDURAL SUMMARY

Petitioner, Larry W. Shives, filed a claim pursuant to the Federal Employers' Liability Act (FELA) 45 U.S.C. § 51, et. seq. against his employer, Respondent, CSXT in the Circuit Court for Baltimore City. CSXT filed a Notice of Removal in the United States District Court for the District of Maryland, Northern Division. CSXT asserted that Shives' claim arose exclusively under the Longshore and Harbor Worker's Compensation Act (LHWCA) and not under the Federal Employers' Liability Act (FELA) and would thus present a removable federal question. At the same time, CSXT also moved to dismiss Shives' claim asserting that Shives failed to exhaust his administrative remedies under LHWCA. Thereafter, Shives filed an opposition to CSXT's motion to dismiss and also filed a motion to remand to the Circuit Court for Baltimore City.

The parties stipulated to the facts and submitted supplemental briefs to the United States District Court. The United States District Court (Smalkin, J.) in a Memorandum Opinion dated August 4, 1997 rejected CSXT's assertion that Shives had a claim under LHWCA and not under FELA. On the same date, the District Court ordered that the case be remanded to the Circuit Court for Baltimore City.

CSXT noted its appeal of the United States District Court's Order on August 6, 1997 and on August 11, 1997 filed a Petition for Writ of Mandamus requesting that the case be reopened in the United States District Court and be dismissed by said court.

On appeal, the Fourth Circuit found that Shives was engaged in maritime employment and thus his claim arose exclusively under the LHWCA. The Fourth Circuit vacated and remanded the case to the United States District Court with instruction to dismiss the case brought under FELA and permit Shives to exhaust his administrative remedies under LHWCA.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit opinion regarding the application of the LHWCA to railroad employee performing non-maritime activities at the time of his injury is in conflict with the United States Supreme Court and other courts of appeal.

The Fourth Circuit opinion rejected Shives' proposed application of the FELA to this case. The Fourth Circuit concluded that Shives met the status test under LHWCA, finding that status is "occupational, intending to provide employees continuous coverage throughout their employment at a maritime situs regardless of the particular activity at the time of injury." *In Re CSX Transportation, Incorporated*, 151 F.3d 164, 169 (4th Cir. 1998). The Fourth Circuit opinion discards the status requirement of LHWCA and misinterprets the Supreme Court's holding in *Northeast Marine Terminal Co. v. Caputo 432 U.S. 249, 97 S.Ct 2348 (1977)* and *P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 67, 100 S.Ct. 328 (1979)*. The *Caputo* and *Pfeiffer* decisions allowed recovery under the LHWCA only when workers would have been considered longshoremen as defined by LHWCA prior to its amendments in 1972 or were not defined as longshoremen prior to the 1972 Amendments, but were engaged in the elements of loading, unloading, repairing, dismantling or building a vessel at the time of their injury.

Prior to 1972, in order for a longshoremen to be covered by the LHWCA, said employee had to be injured upon the navigable waterways of the United States. Coverage depended entirely on the situs of the longshoremen at the time of his injury. In *Nacirema Operating Company v. Johnson, 396 U.S. 212, 90 S.Ct 347 (1969), reh den. 397 U.S. 929*, this Court rejected coverage of the LHWCA to three employees who were knocked onto a pier when attaching cargo from railcars to crane for loading on a ship. A fourth employee who

was knocked into the water was covered under LHWCA.1 This Court reasoned that because three of the men did not fall into the river or other navigable waterway they were not entitled to compensation under LHWCA.

To address the inconsistencies in the LHWCA and to stop longshoremen from walking in and out of federal versus state workers' compensation coverage depending on where their injury occurred, Congress amended LHWCA in 1972. The 1972 amendments replaced the purely situs test with a two prong situs and status test to determine coverage under the Act.

The situs requirement found in 33 U.S.C. § 903(a) extended coverage to injuries "upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." Because the expanded situs test reached any employee working at a marine terminal, a status requirement was also included in the amendments.

The status requirement is found in 33 U.S.C. § 902(3) which defines an employee covered by the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker..."

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1 No petition for writ of certiorari was sought in reference to the employee who fell into the water.

In the present case there was no dispute that Shives met the situs requirement under LHWCA. Shives was working on a marine terminal which was specifically included in the expanded situs requirement under 33 U.S.C. § 903(a). Therefore, the analysis must turn on whether Shives met either of the two alternative requirements for status under the Act based upon 33 U.S.C. § 902(3) which requires that (1) employee must either be a longshoreman or (2) be engaged in longshoring operations [at the time of his injury]. Here, Shives is clearly not a longshoreman. The District Court found that Shives did not satisfy the status test necessary for jurisdiction under the LHWCA. Shives was not engaged in any of the essential elements of loading or unloading a vessel at the time of his injury. Also, the Court noted that only 15% of the daily container traffic handled by Seagirt Marine Terminal involved cargo being loaded or unloaded from any maritime vessel.

The status requirement found in 33 U.S.C. § 902(3) required that an employee be engaged in maritime employment and indicated that maritime employment is defined as a longshoreman or one engaged in longshoring work, unfortunately neither the amendments themselves nor the legislative history further defined maritime employment. *See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).* Beyond this explanation it has been left to the courts to set the parameters of what is included in maritime employment.

This Court first addressed this issue in *Northeast Marine Terminal Co. v. Caputo , 432 U.S. 249 (1977)* in which this Court extended coverage to Blundo, a checker and Caputo, a member of a regular longshoring gang. Blundo was employed as a checker and was to check and record cargo as it was loaded or unloaded onto vessels. On January 8, 1974, Blundo slipped on ice and was injured when checking a container unloaded from a vessel at another pier. *Northeast Marine Terminal Co., supra at 253.* Caputo was a terminal laborer who worked for different stevedoring companies at

Northeast Marine Terminal. On April 16, 1973, Caputo was injured while helping load trucks with cargo discharged from ships at that terminal. Both Blundo and Caputo were longshoremen as defined by LHWCA prior to the 1972 Amendments, but would not have been covered before 1972 merely because their injuries occurred on land and not over navigable waters. Thus, they would have been covered by the state workers' compensation system of the state in question. Under the expanded coverage provided by the 1972 Amendments, this Court held that both men were engaged in maritime employment at the time of their injuries. Blundo's job as a checker was to mark items as they were unloaded from a vessel. This job was directly related to loading and unloading of a vessel. Caputo was covered because his job had a direct impact on loading and unloading of vessels. This Court reasoned that Caputo was "the type of amphibious worker who without the 1972 amendments would be covered for only part of his activities." *Northeast Marine Terminal 432 U.S. at 273.* Caputo was a longshoremen who was employed by a stevedoring company and he performed his job unloading cargo either on the vessel itself or on the pier. Because Caputo and Blundo were both longshoremen as defined by the pre 1972 amendments, it is not necessary that they be performing longshoring operations at the time of their injuries. This interpretation is evidenced by Justice Marshall's statement in *Northeast Marine Terminal, supra at p. 273:*

> The Act focuses primarily on occupations - longshoremen, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered for only part of their activity. It seems clear, therefore, that when Congress said it

> wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments would be covered for only part of their activity.

In the instant case, Shives is not the type of amphibious worker Congress intended to protect unless he was engaged in longshoring activities at the time of his injury. Shives' job as a carman is to inspect railcars and assist in the loading and unloading of flatbed railcars. He was certainly not a longshoreman and would not have been considered a longshoreman prior to the 1972 Amendments. In fact on the day of Shives' accident, there were no vessels in the marine terminal. Throughout the entire six years, Shives worked at the terminal only 15% of all traffic in and out of the terminal even involved ships.

This Court also addressed this issue in *P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328 (1979)*. In that case, this Court affirmed LHWCA benefits for a warehouseman and cotton header. While neither man was injured on navigable waterways of the United States, they were both performing longshoremen duties of transferring cargo from ships to land transport. This Court cautioned however, that not all employees who work in areas adjoining navigable waters are covered by LHWCA.

Justice Powell stated:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus employees whose responsibility is only to pick

up stored cargo for further trans-shipment would not be covered. *Pfeiffer, supra, 444 U.S. at 80, 100 S.Ct at 335 (1979).*

Shives' job was not essential to loading or unloading a vessel. His job was more in line with picking up cargo for further shipment and under *Pfeiffer* could not be covered under LHWCA. In other words, if an employee is not a longshoreman, he must be engaged in longshoring activities at the time of his injury.

However, the Court of Appeals for the Fourth Circuit is overruling the District Court also ignored the importance of the nature of the work Shives was engaged in at the time of his injury. In fact, the Fourth Circuit concluded that the activity in which Shives was performing at the time of his injury was of little importance. *In Re: CSX Transportation, Incorporated, No. 97-2038, No. 97-2053, 151 F3d 164, 169 (4th Cir, 1998) (emphasis added).*

This reasoning is flawed because under the LHWCA, an employee who is not a longshoreman is only covered when engaged in the elements of loading, unloading, repairing, dismantling or building a vessel. *See Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981) cert den. 454 U.S. 1163, 102 S.Ct 1037; Browning v. B.F. Diamond Const. Co., 676 F.2d 547 (11th Cir. 1982), cert den. 459 U.S. 1170, 103 S.Ct 814; Chesapeake & Ohio Ry. v. Schwalb, 493 U.S. 40, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989).*

If an employee is not a longshoreman and his job does not affect the loading and unloading of a maritime vessel, then the employee is not covered under the LHWCA simply because the situs of his job is a marine terminal. *See Pfeiffer 444 U.S. at 83, 100 S.Ct at 337.* In the case at bar, Shives was checking containers that were being loaded from trains having originated in Jacksonville, Florida onto trucks. At no time did the job in which he was engaged have anything to do with the loading or unloading of a vessel. Shives' job was not related in any way to

maritime activities. There were no vessels at the terminal on the day of the occurrence. To hold that Shives was engaged in maritime employment under these circumstances would extend coverage of the LHWCA well beyond the intentions of Congress when it adopted LHWCA. *S.Rep. No. 92-1125, p. 13 (1972) and H.R. Rep. No. 92-1441, pp. 10-11 (1972) as cited in P.C. Pfeiffer Co., Inc. v. Ford, 100 S.Ct at 335, 444 U.S. at 80.*

The Fourth Circuit's decision in *Shives'* case is in contrast to its earlier decision in *Hayes v. CSX Transportation, Inc., 985 F.2d 137 (4th Cir. 1993).* The Fourth Circuit in *Hayes* held that a carman was engaged in maritime employment when he assisted the crane operators in unloading a train. However, the origins of the cargo which Hayes was helping unload were unknown, but the Fourth Circuit assumed "it was obvious that Hayes was engaged in maritime employment at the time of his injury." *Hayes, 985 F.2d at 142.* In the present case, the facts were quite different. Shives was not engaged in the loading or unloading of a vessel. The train on which Shives was working originated from Jacksonville and all of its cargo was for transport by truck.

The District Court clearly found "a sharp contrast" between the facts as they existed in the present case and the facts in *Hayes.* Judge Frederic Smalkin in his Memorandum Opinion, App. 17 stated:

> ... the evidence is undisputed that none of the containers or other freight carried by the incoming train on which Mr. Shives was working at the time of his accident was destined for transport by a maritime vessel, and that only 15% of the daily container traffic handled by the terminal involved cargo from trains being transhipped from boat to train or vice versa. Under these circumstances, the Court is constrained to conclude that, although the

Seagirt terminal is an appropriate situs for the application of LHWCA, Mr. Shives did not meet the status test at the time of his injury.

The Fourth Circuit's opinion seems to suggest that even though he is clearly not a longshoreman, the work Shives was performing at the time of his injury was of no legal import. This contention would essentially strip the LHWCA of its status requirement and is not supported by the Fourth Circuit's earlier decision in *Hayes, 985 F.2d 137 (4th Cir. 1993)* The Court stressed in its decision that Hayes was "engaged in maritime employment at the time of his injury." *(emphasis added) Hayes, 985 F.2d at 138.* The Court in *Hayes* later states that "it was obvious Hayes was engaged in maritime employment at the time of his injury." *Hayes, supra, 985 F.2d at 142.* The *Hayes* Court assumed from the limited factual information that it was given that Hayes was engaged in maritime employment at the time of his injury. Clearly, the work they assumed Hayes to be doing when the accident occurred was of considerable legal import.

In the Shives' case, no assumption is necessary. Shives was not engaged in maritime activity at the time of his injury and thus does not meet the status test required for coverage under the LHWCA.

The Fourth Circuit also considered Respondent, CSXT's argument that Congress intended to prevent employees from walking in and out of coverage. While this may be true, it is misapplied in this case. Congress intended to prevent employees from walking in and out of federal versus state coverage for their injuries. Congress was concerned about the inadequacy of the state remedies available to longshoremen depending on where they were injured. *S.Rep 12-13, House Report H.R. Rep. No. 92-1441 pp. 10-11 as cited in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 261 (1977).*

However, in the case of railroad workers Congress enacted a separate statute called the Federal Employers'

Liability Act, 45 U.S.C. §151, et. seq. FELA was specifically enacted "to put on the railroad industry some of the cost for legs, eyes, arms and lives which it consumes in its operations." *Wilkerson v. McCarthy, 366 U.S. 53, 68 (1949).* There is no such concern voiced as the policy behind the enacting of the LHWCA and its 1972 Amendments. In *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 261, 97 S.Ct 2348 (1977),*

Justice Marshall states:

> The main concern of the 1972 Amendments was not the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties.

There can be no doubt that Shives was a railroad worker at the time of his injury. He worked for CSXT as a carman with his main duties being to hitch and unhitch flatbed railcars. Congress intended railroad workers to be covered by the law they specifically passed to compensate railroad workers for injuries occurring while in the performance of their duties for the railroad. It is difficult to imagine that Congress in passing the 1972 Amendments of the LHWCA would be concerned about an employee already adequately protected by

FELA, a statute which has been in force and effect since 1908.

The Fourth Circuit erred when it held that Shives' case was governed by the LHWCA, instead of by the FELA. More importantly, the Fourth Circuit's opinion extends the LHWCA well beyond the boundaries Congress or this Court's earlier decisions intended.

CONCLUSION

In view of the foregoing, Larry W. Shives, respectfully requests this Court to grant the Petitioner's Writ of Certiorari.

Respectfully submitted, this 13th day of October, 1998.

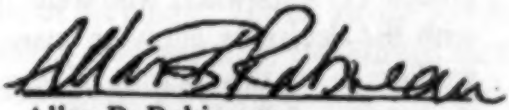

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TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered July 16, 1998 ..... App. 1

Memorandum Opinion,
United States District Court
for the District of Maryland
entered August 4, 1997 ..... App. 16

Order,
United States District Court
for the District of Maryland
entered August 4, 1997 ..... App. 18

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2038

In Re: CSX TRANSPORTATION, INCORPORATED,

Petitioner.

On Petition for Writ of Mandamus.
(CA-97-1611-S)

No. 97-2053

LARRY W. SHIVES,

Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INCORPORATED,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-97-1611-S)

Argued: May 6, 1998
Decided: July 16, 1998
Entered: July 16, 1998

Before NIEMEYER and MICHAEL, Circuit Judges, and FRIEDMAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Michael and Judge Friedman joined.

COUNSEL

ARGUED: Eric Rawson Harlan, Stephen Bennett Caplis, WHITEFORD, TAYLOR & PRESTON, L.L.P., Baltimore, Maryland, for Appellant. Perry Matthew Darby, ALBERTINI & DARBY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Guy M. Albertini, Allan B. Rabineau, Theresa A. Rosendale, ALBERTINI & DARBY, Baltimore, Maryland, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

The question presented is whether a worker was engaged, at the time of his work-related injury, in "maritime employment" as defined in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), when his job at a marine terminal included the loading and unloading of ships only 15% of the time and when he was unloading non-maritime freight from a train at the time of his injury. Because we hold that the worker was engaged in maritime employment, we vacate and remand to the district court with instructions to dismiss this case, which was brought under the Federal Employers' Liability Act, to permit the administrative process on the worker's pending Longshore Act claim to run its course.

I

Larry W. Shives was injured in August 1996 at the Seagirt Marine Terminal in Baltimore, Maryland, while in the employ of CSX Transportation, Inc. ("CSXT"). Shives was employed as a "carman," a job that required him to inspect train cars and assist in loading and unloading them. The Seagirt Marine Terminal is an intermodal terminal where freight is unloaded from trains onto ships as well as trucks, and vice versa. The parties have stipulated in this case that 15% of the tasks assigned to CSXT's carmen such as Shives involved the loading and unloading of maritime freight. The remainder of the carmen's time was spent on non-maritime transfers of freight from trains to trucks and vice versa.

When Shives sustained his injury, he was assisting in the unloading of a flatbed train car that carried UPS trailers. As he unlocked the hitch on the car, he slipped on some oil, twisting his right knee and striking it against the bed of the car. The parties stipulated that the cargo on the train on which Shives was injured was being unloaded onto trucks for inland destinations.

Following his injury, Shives filed a negligence suit against CSXT in Maryland state court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq. He also filed a protective worker's compensation claim with the Department of Labor under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq.

Contending that Shives was engaged in maritime employment and therefore entitled only to workers compensation under the LHWCA, CSXT removed Shives' case to federal court under 28 U.S.C. §§ 1441 and 1331. It then moved to dismiss the case to allow Shives' administrative claim to proceed before the Department of Labor. Shives filed a motion to remand the case to the state court, arguing that he was not engaged in maritime

employment and thus was entitled to pursue his negligence claim in state court under the FELA.

The district court, recognizing that in order to be covered by the LHWCA, Shives had to satisfy both the situs and status requirements of the Act, held first that Shives' injury occurred at a maritime situs. Pursuant to its status inquiry, however, it concluded that because "none of the containers or other freight carried by the incoming train on which Mr. Shives was working at the time of his accident was destined for transport by a maritime vessel, and . . . only 15% of the daily container traffic handled by the terminal involved cargo from trains being transhipped from boat to train or vice versa," Shives did not meet the status test "as of the time of his injury." Accordingly, the court entered an order granting Shives' motion to remand the case to the state court.

CSXT filed this appeal from the district court's order. Because CSXT was concerned with whether the district court's order was appealable in light of 28 U.S.C. § 1447(d), it also filed a petition for a writ of mandamus to review the district court's order by virtue of our holding in Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994).

II

At the outset, we must satisfy ourselves on the question of whether we have jurisdiction to review the district court's order in light of 28 U.S.C. § 1447(d) (prohibiting appellate review of remand orders), which is limited by Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 346, 352-53 (1976) ("[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein -- that removal was improvident and without jurisdiction -- are immune from review under § 1447(d).").

Shives filed this case in state court under the FELA, 45 U.S.C. § 51 et seq., which confers concurrent federal and state jurisdiction over FELA claims. See 45 U.S.C. § 56. But

when filed in state court, an FELA claim may not be removed to federal court. See 28 U.S.C. § 1445(a). CSXT claimed that this case was not an FELA claim but rather a claim for federal workers compensation under the LHWCA because Shives was engaged in maritime employment at the time of his injury. It therefore removed this case to federal court under 28 U.S.C. § 1441(b) based on federal question jurisdiction conferred by 28 U.S.C. § 1331. Because the district court concluded that Shives was not engaged in maritime employment at the time of his injury and that therefore he could pursue his FELA claim, it ordered a remand based on 28 U.S.C. § 1445(a) (prohibiting the removal of FELA cases). Not sure how to obtain appellate review of the district court's order, CSXT both filed a notice of appeal and petitioned for a writ of mandamus, relying on Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994).

While 28 U.S.C. § 1291 confers jurisdiction on the courts of appeals "from all final decisions of the district courts," the removal statute prohibits appellate review of district courts' orders "remanding a case to the State court from which it was removed." 28 U.S.C. § 1447(d). In Thermtron, however, the Supreme Court limited the application of § 1447(d), holding that § 1447(d) only restricted appellate review of remand orders based on § 1447(c) -- a provision addressing remands where a removal was improvident or the district court was without subject matter jurisdiction. See 423 U.S. at 346; see also Jamison, 14 F.3d at 231-32. Absent the proscription of § 1447(d), it would appear that an order remanding a case to state court puts the litigants out of federal court, effectively ending the federal case, and therefore is a final order appealable under § 28 U.S.C. § 1291. See Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1719 (1996).

In this case, the district court could not rule, in a strict sense, under § 1447(c) that it was without jurisdiction because federal courts have concurrent jurisdiction over FELA claims. See 45 U.S.C. § 56. Rather, it ruled properly

that an FELA claim could not be removed from a state court to a federal court. See 28 U.S.C. § 1445(a). Moreover, its ministerial application of § 1445(a) depended on its substantive ruling that Shives was not engaged in maritime employment. This determination is probably not of the type of ruling included in 28 U.S.C. § 1447(c), see Jamison, 14 F.3d at 232, and therefore prohibited by § 1447(d). This conclusion, however, is not entirely without doubt.

It is clear that the remand order presented to us for review does not play the typical rerouting role of directing non-federal cases back to state court. The question of whether the LHWCA applies to a workrelated injury is exclusively a federal question which Congress never intended for state courts to resolve. See 33 U.S.C. § 921; cf. Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 258 (4th Cir. 1991) (noting that interpretation of the LHWCA is a matter for the federal executive and federal appeals courts). If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d), then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals. See 33 U.S.C. §§ 919, 921.

Thus, because the coverage question of the LHWCA is a conceptual antecedent for the district court's remand order, it would appear that we are not prohibited by § 1447(d) from reviewing that order. See Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1450-51 (4th Cir. 1996). In Mangold, we held that if, after examining the district court's reasoning for remand, we determined that the order did not fall precisely under the grounds identified in § 1445(c), we were authorized to review the order on appeal. See Quackenbush , 116 S. Ct. at 1719-20. We said, "review of

the remand order, because not actually based on either of the grounds specified in § 1447(c), is not barred by § 1447(d)." 77 F.3d at 1453.

If we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a writ of mandamus. To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in Thermtron for exercise of the writ. We held analogously in Mangold that "to fragment a claim between state and federal courts [was] fraught with mischief and capable of producing unnecessary tensions between the two systems" and that therefore we were justified in treating an appeal as a petition for a writ of mandamus. Id.

Accordingly, while we exercise appellate jurisdiction with some delicacy, we also recognize our review authority on the employer's petition for a writ of mandamus. See Jamison, 14 F.3d at 233-34. We now turn to the coverage question.

III

To be covered by the LHWCA, a work-related injury must have occurred on "navigable waters," as defined by 33 U.S.C. § 903(a), and the employee must have been engaged in "maritime employment," as defined by 33 U.S.C. § 902(3). The parties agree that Shives' injury occurred on navigable waters because it occurred while Shives was working at a terminal adjoining navigable waters. See 33 U.S.C. § 903(a) (defining "navigable waters" to include adjoining terminal areas). The sole issue therefore is whether Shives was "engaged in maritime employment" as defined by 33 U.S.C.§ 902(3) when he sustained his injury. While Shives acknowledges that 15% of his job entailed the loading and unloading of maritime freight, he contends that because, at the time of his injury, he was unloading freight from a train onto trucks not ships, he was not covered by the

LHWCA and therefore was entitled to pursue his FELA claim for negligence. His interest in an FELA claim stems from his belief that a recovery under the FELA will be more remunerative than an award for workers compensation under the LHWCA.

CSXT concedes that at the time of Shives' injury, the loading activity was not of maritime freight nor in connection with a ship. It argues, however, that "the work which [Shives] was performing at the time of injury is of no legal import." It maintains that maritime employment is occupational, defined by whether the employee spends some portion of his overall work engaged in maritime employment. Because Shives' work concededly involved 15% maritime employment, CSXT argues, he was covered by the LHWCA.

The issue thus reduces to a two-part question: whether an employee who engages in maritime activities only 15% of the time is "engaged in maritime employment" as defined by the LHWCA and whether it matters that at the time of his injury he was performing a nonmaritime duty.

Prior to 1972, the LHWCA applied only to injuries occurring on navigable water, and the line demarcating land and water also defined the line between coverage of the LHWCA and coverage of state workers' compensation laws. See generally Jonathan Corp. v. Brickhouse, 142 F.3d 217 (4th Cir. 1998). "As a consequence, Longshoremen continually walked in and out of LHWCA coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels." Id. at *2 (quoting Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1135 (4th Cir. 1995)). To provide more uniform coverage for longshoremen as they loaded and unloaded ships and to provide federal coverage for all workers who loaded ships, whether they were on the water or the adjacent land, Congress amended the LHWCA to extend coverage to the area adjacent to the ship that is normally used for loading and unloading. In addition, because of this expanded

geographical coverage, it restricted the coverage to maritime employment. Thus, while coverage before 1972 was based solely on a situs test delineated by the shoreline, coverage after the 1972 amendments was based on meeting a two-part situs and status requirement. See P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73 (1979).

To satisfy the situs test adopted in 1972, an injury must occur on "navigable waters" defined to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). And to satisfy the status test, the employee must be engaged in "maritime employment," defined to include "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3).

While the new situs test mitigated the "walking in and out of coverage" problem by moving the line inland in order to cover workers loading and unloading ships both from on the water and from on the land, a worker could still walk into and out of a LHWCA situs because the line remained geographical. See Jonathan, 142 F.3d at 220. The status test, however, is occupational, intending to provide employees continuous coverage throughout their employment at a maritime situs regardless of the particular activity at the time of injury. As the Supreme Court stated in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977):

> The Act focuses primarily on occupations--longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 amendments, would be

> covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity.

Id. at 273 (emphasis added). Confirming later the occupational characteristic of this status test, the Court observed, "the 'maritime employment' requirement is 'an occupational test that focuses on loading and unloading.'" Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423-24 (1985) (quoting Pfeiffer, 444 U.S. at 80). And in determining occupation, "the crucial factor is the nature of the activity to which a worker may be assigned." Pfeiffer , 444 U.S. at 82 (emphasis added). Finally, the Supreme Court has instructed that any coverage determination be informed by "an expansive view of the extended coverage." Caputo, 432 U.S. at 268. It said, "The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" Id.

In short, the status inquiry focuses on the assigned occupational duties of the employee, and coverage is not denied simply because the employee was not performing a maritime function at the time of his injury. To determine whether the employee is engaged in maritime employment, we inquire whether the employee's assigned job requires his spending some of his time in indisputably longshoring operations.

This construction of the status requirement is consistent with Congress' intent to fill the gap that existed before the 1972 amendments when longshoremen could walk in and out of coverage as they walked up and down the gangplank. In combination with the situs requirement, the status requirement thus provides LHWCA benefits more

seamlessly to all those who perform some longshoring operations. Indeed, it is instructive to recognize that an employer covered by the LHWCA is defined as one whose "employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [as defined by the Act]." 33 U.S.C. § 902(4) (emphasis added). Were we to adopt a more restrictive interpretation that maritime employment refers only to the particular activities of the longshoreman being performed at the specific moment of injury, we would "bring the `walking in and out of coverage' problem back with a vengeance." Chesapeake and Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 50 (1989) (Blackmun, J., concurring); see also Caputo, 432 U.S. at 274.

Our test requiring the examination of an employee's assigned duties to determine whether some of them include longshoring operations is similar to that adopted in other circuits. In Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346 (5th Cir. 1980), the Fifth Circuit held that an employee who spent only 2-1/2 to 5% of his overall working time performing longshore work was nevertheless engaged in maritime employment since he spent "at least some of [his] time in undisputedly longshoring operations." Id. at 1347 (quoting Caputo, 432 U.S. at 273). The court observed

> Boudloche was directed to regularly perform some portion of what was undisputedly longshoring work at fully equipped docks and, for at least some part of his work, was required to perform the total maritime job at unequipped docks. The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make Boudloche a maritime employee under the Act.

Id. at 1348; see also Howard v. Rebel Well Serv., 632 F.2d 1348 (5th Cir. 1980) (a sandblaster who spent 10% of his

time sandblasting maritime equipment was engaged in maritime employment). The Fifth Circuit subsequently summarized its rule, stating, "a claimant will meet the status requirement of the Act, not only if he is engaged in 'maritime employment' at the time of injury, but also if he spends some portion of his overall employment engaged in maritime activities." Hullinghorst Indus., Inc. v. Carroll , 650 F.2d 750, 754 (5th Cir. Unit A, July 1981). See also Garvey Grain Co. v. Director, OWCP, 639 F.2d 366, 371 (7th Cir. 1981) (noting that "[t]he 'moment of injury' test is no longer the test to determine the status of an employee under the Act" and that coverage may be found where an employee "spends at least some of his time in indisputedly longshore operations"); Sea-Land Servs., Inc. v. Director, OWCP, 685 F.2d 1121, 1123 (9th Cir. 1982) (same).

Seagirt Marine Terminal is an intermodal maritime situs where freight is transferred from train to ship, from train to truck, from truck to ship, and from truck to train. When CSXT assigned its employees the carmen's duties of loading and unloading its train cars at the terminal, it expected that the carmen would unload all of its freight, whether that freight was destined for truck or for ship. Likewise, it expected the carmen would load its trains with freight that arrived at the terminal, whether that freight arrived by truck or by ship. Because its carmen's duties consisted of loading and unloading at a marine terminal and some of the loading and unloading involved ships, the carmen by occupation were engaged in maritime employment. The fortuity that some freight at the terminal would bypass ships does not deny the carmen's employment a maritime characteristic. Moreover, as we have noted, even if the employee's particular function at the time of his injury was not maritime, he is not denied coverage based on a lack of maritime status. Because maritime status is an occupational inquiry, we determine only whether some of the employees' work was indisputedly maritime in nature.

Shives, hoping that the LHWCA does not cover him because of his expectation of realizing a more beneficial recovery through his FELA claim, argues that because only 15% of his duties involved the loading and unloading of maritime freight, he was not engaged in maritime employment. This argument, suggesting that maritime employment is determined by some defined percentage of an employee's work, however, is not useful and misdirects the inquiry. Congress wanted the LHWCA to cover longshoremen loading and unloadingships, whether they are on the ship or at the adjacent terminal, and the Supreme Court has clearly held that to give effect to this intent, the employee does not move in and out of maritime employment status for purposes of coverage under the Act. Shives was assigned maritime work as needed at the marine terminal, and this longshore work was not merely "momentary or episodic." Boudloche, 632 F.2d at 1348. It was an assigned portion of his duties necessary in order for CSXT to function at the terminal efficiently.

Undoubtedly, there is a level of longshore work assigned to an employee that may be so de minimis as to defeat coverage. We need not, in this case, determine that level because we conclude that Shives was clearly assigned to do some indisputably longshore work when he was assigned, as part of his job, to load and unload maritime freight at the Seagirt Marine Terminal.

The district court relied on our decision in Hayes v. CSX Transp., Inc., 985 F.2d 137 (4th Cir. 1993), in ruling that Shives was not engaged in maritime employment "as of the time of his injury." It noted that Hayes inquired whether the employee "was engaged in maritime employment at the time of his injury," id. at 140 (emphasis added), and reasoned that "none of the containers or other freight carried by the incoming train on which Mr. Shives was working at the time of his accident was destined for transport by a maritime vessel." While the status test properly inquires whether the employee was engaged in maritime employment at the time

of his injury, this does not mean that his particular duties at the time of injury needed to be maritime in nature. Rather, the status test turns on whether the employee's occupation at the time of injury was maritime. By its nature, therefore, a status test considers the employee's occupation as a whole, not the nature of the particular job function being performed at the time of injury. Indeed, this is how we understood the test in Hayes because we acknowledged that "the origins or destination of the loads being worked at the time [of Hayes' injury] are unknown." 985 F.2d at 139.

In summary, we hold that because, at the time of injury, Shives was performing his assigned work as a carman at the Seagirt Marine Terminal and because some of his carman's duties were indisputably maritime, Shives was engaged in maritime employment as defined by the LHWCA. Because Shives met both the situs and the status tests of the LHWCA, he was covered by the Act.

This LHWCA coverage is exclusive and preempts Shives from pursuing an FELA claim. See 33 U.S.C. § 905(a); Etheridge v. Norfolk & W. Ry. Co., 9 F.3d 1087, 1091 (4th Cir. 1993).

IV

Having concluded that Shives only has an LHWCA claim, and not an FELA claim, we are left with a procedural conundrum. Section 1441 of Title 28 authorizes removal of civil actions "of which the district courts have original jurisdiction." 28 U.S.C. § 1441(b); see also § 1441(a). While Shives' LHWCA claim arises under the laws of the United States, see 28 U.S.C. § 1331, it is not an action over which the district courts have original jurisdiction. An LHWCA claim must be filed with the Department of Labor where it is assigned to an administrative law judge whose decision is reviewed by the Benefits Review Board. 33 U.S.C. §§ 910(a), 921(b). Review by the courts is authorized through a

petition for review, which may be filed only in the courts of appeals, not in the district court. 33 U.S.C. § 921(c).

Thus, not only was Shives' claim not removable as an FELA case, see 28 U.S.C. § 1445(a), it was also not removable under 28 U.S.C. § 1441(b). But the remedy for the improper removal in this case does not appear to be a remand to state court as ordered by the district court, which acted on its finding that this is an FELA case. State courts have jurisdiction over FELA cases, but they do not have jurisdiction over LHWCA cases.

While state court jurisdiction is not ordinarily a prerequisite for removability, see 28 U.S.C. § 1441(e), jurisdiction in the district court is, see 28 U.S.C. § 1441(a) & (b). Thus, we are faced with an LHWCA case over which neither the state court nor the district court had jurisdiction because such a claim could only be filed in the first instance with the Secretary of Labor.

While the only intuitive remedy might nevertheless be to remand this case to the state court to decide the coverage question, if we were to do so, we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court. In the peculiarities of this case, we believe that the district court should not have remanded the case to state court, but should have dismissed it. Accordingly, we vacate the district court's remand order and remand this case to the district court with instructions to dismiss the case for lack of subject matter jurisdiction. In this way, Shives will be able to proceed through the administrative process before the Department of Labor with his protectively filed LHWCA claim.

IT IS SO ORDERED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LARRY W. SHIVES

v.

CSX TRANSPORTATION, INC.

CIVIL NO. S 97-1611

Entered: August 4, 1997

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's motion to remand, following supplemental briefing. No oral hearing is required. Local Rule 105.6, D. Md.

This suit started as an FELA claim in the Circuit Court for Baltimore City. The defendant removed it to this Court on the basis that, in actuality, it stated a claim under the LHWCA. The plaintiff maintains that this case is not an LHWCA case, but, rather, is an FELA case which, is non-removable. 28 U.S.C. § 1445(a).

The question of the nature of this case, FELA vs. LHWCA, is dispositive of the jurisdictional issue posed by the motion to remand. That question is answered by the Fourth Circuit's decision in *Hayes v. CSX Transp., Inc.*, 985 F.2d 137 (4th Cir. 1993). In *Hayes*, as in this case, the injury occurred at a maritime terminal, thus satisfying one of the two tests, i.e., the "situs" test, for jurisdiction under the LHWCA.

The "situs" test is, however, only one of the two tests that must be met before LHWCA jurisdiction exists. *Hayes*, 985 F.2d at 140. This case as did *Hayes*, turns on whether the second test is also satisfied, viz., the "status" test. This resolves into an inquiry as to "whether he [plaintiff] was

engaged in maritime employment at the time of his inquiry." In *Hayes*, there was no information as to the origins or destinations of any of the containers the plaintiff had been handling, but the Fourth Circuit assumed that it was "obvious that Hayes was engaged in maritime employment at the time of his injury. He was engaged in completing the unloading process and in moving the cargo form ship to land transportation." *Id.*, at 142.

In this case, in sharp contrast, the evidence in undisputed that none of the containers or other freight carried by the incoming train on which Mr. Shives was working at the time of his accident was destined for transport by a maritime vessel, and that only 15% of the daily container traffic handled by the terminal involved cargo from trains being transhipped from boat to train or vice versa. Under these circumstances, the Court is constrained to conclude that, although the Seagirt terminal is an appropriate situs for the application of LHWCA, Mr. Shives did not meet the status test as of the time of his injury.

Therefore, an Order will be entered separately, remanding this case to the Circuit Court for Baltimore City. Each party will bear its own costs and fees in connection with removal and remand.

/s/_____
Frederic N. Smalkin
United States District Judge

Dated: August 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LARRY W. SHIVES

v.

CSX TRANSPORTATION, INC.

CIVIL NO. S 97-1611

Entered: August 4, 1997

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 4th day of August, 1997, ORDERED:

1. That plaintiff's motion to remand BE, and the same hereby IS, GRANTED;

2. That this case BE, and it hereby IS, remanded to the Circuit Court for Baltimore City, with each party to bear its own costs, fees and expenses in connection with removal and remand;

3. That the Clerk of Court forthwith transmit the record herein along with a certified copy of this Order to the Clerk for the Circuit Court for Baltimore City;

4. That the Clerk of Court mail copies hereof and the foregoing Memorandum Opinion to counsel for the parties; and

5. That this case be CLOSED on this Court's docket.

/s/_____
Frederic N. Smalkin
United States District Judge